

(2020) 10 AFT CK 0001
In the Armed Forces Tribunal
Case No : Original Application No. 168 Of 2020

Sanjeev Yashwant Devasthali	Vs	APPELLANT
Union Of India And Others		RESPONDENT

Date of Decision : 09-10-2020

Acts Referred:

Armed Forces Tribunal Act, 2007 — Section 14

Citation : (2020) 10 AFT CK 0001

Hon'ble Judges : Rajendra Menon, J; Philip Campose, Member (A)

Bench : Division Bench

Advocate : Rajiv Manglik, K.S Bhati

Final Decision : Dismissed

Judgement

1. This Original Application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 by the applicant, an officer in the rank of

Brigadier in the Electrical and Mechanical Engineers (EME) Branch, who feels aggrieved by his non-empanelment for promotion to the rank of Major

General, for which No.1 Selection Board (EME) was held in October 2018, in which he was considered as a 'Final Review' case and results declared

on 15.03.2019 and that, subsequently, his Non-statutory and Statutory Complaints thereto were rejected by the second respondent vide order dated

29.07.2019 and first respondent vide impugned order dated 27.12.2019 respectively. The applicant has assailed the impugned orders of the

respondents thereto and made the following prayers:

(a) Peruse the records relating to the No. 1 Selection Board (EME) held in October 2018 and set aside the same due to being unjust, arbitrary and

illegal;

(b) Set aside the impugned orders dated 29.07.2019 and 27.12.2019, whereby his complaints thereto were rejected by the respondents; and

(c) Promote the applicant to the rank of Major General and grant all consequential benefits accordingly.

2. Brief facts of the case, as averred by the applicant, are that he was commissioned as an Artillery officer in December 1984 and subsequently in

1990, transferred to EME due to medical problems sustained during service in High Altitude Area. He performed well in the EME and was credited

with a number of achievements like standing first on the Degree Engineering Course and qualifying on the Defence Services Staff College Course and

the Higher Defence Management Course. He was promoted to the rank of Brigadier in March 2011 and posted as Chief Electronics Engineer, HQ

Technical Group. In October 2018, while he was performing duties as Deputy Military Secretary - EME in the Military Secretary's Branch at Army

Headquarters, he was considered for promotion to the rank of Major General as a 'Final Review Case' along with other EME Brigadiers by the No. 1

Selection Board (EME), but he was not empanelled for promotion. The Non-statutory and Statutory Complaints against non-empanelment filed by him

were rejected by the respondents on 29.07.2019 and 27.12.2019 respectively. Hence this OA.

3. Mr. Manglik, learned counsel for the applicant submitted that the applicant had performed very well in courses and on various important

assignments throughout his career and the very fact that he was posted as Deputy Military Secretary for the EME Controlling Group in the Military

Secretary's Branch is indicative of the fact that he was on the top of the merit in his batch of EME. Further, the fact that his relieving officer was

posted in immediately after the conduct of his Selection Board in October 2018 was clearly reflective of the fact that he had been recommended for

empanelment by the Board. Hence, the fact that there was subsequent delay in declassification of the Board results and that he was not in the final list

of empanelled officers shows that the approving authority (first respondent) may have intervened unfairly during the approval process in a manner that

resulted in his subsequent removal from the empanelled list. This, learned counsel contended, is in contravention to the existing policy as the Board

marks cannot be changed by the approving authority, without the matter being referred back to the Selection Board for reconsideration.

4. In support of his arguments, learned counsel for the applicant placed reliance on the decisions in *RS Mittal v. Union of India and others* (1995) Supp

2 SCC 230 and in *Ma] Gen /-LM Singh v. Union of India and others* (2014) (1) SCALE 135, wherein it was held that reason has to be given for such

decision when recommendation of the Selection Board is modified by the Selection Board. If such change is made to the detriment or interest of a

recommended officer, this is reflective of arbitrary State action, which is illegal. He also made reference to the decision of the Hon'ble Supreme Court

in *East Coast Railway v. Mahadev Appa Rao* (2010) 7 SCC 678 where it was observed as under:

While no candidate acquires an indefeasible right to almost merely because he has appeared in an examination or even found place in the

select list, yet the State does not enjoy an unqualified prerogative to refuse an appointment in an arbitrary fashion or to disregard the merit

of the candidates as reflected by the merit list prepared at the end of the selection process. The validity of the State's decision not to make

an appointment is this a matter which is not beyond judicial review before a competent writ court. If any such decision is found to be

arbitrary, appropriate directions can be issued in the matter. The least which the candidates who were otherwise eligible for appointment

and who had appeared in the examination that constituted a step-in-aid of a possible appointment in their favour were entitled to is to

ensure that the selection process was not allowed to be scuttled for mala fide reasons or in an arbitrary manner.

5. Furthermore, the learned counsel also placed reliance on an order passed by the Kolkata Bench of this Tribunal in *Brig D.N Singh V. Union of*

India and others (O.A No. 85 of 2013 decided on 9.09.2014) wherein it was held that the recommendations of the Selection Board along with the 'value

judgment' marks are important. Para 19 of the said order is reproduced as hereunder:

19. As regards the first issue, it is observed that as per MoD's own policy letter dt 4 Jan 2011, it is provided in para 3 that overall

distribution of marks will be.' Therefore, it is evident that there are two separate components viz. Q marks and VJ marks and total marks

secured by a candidate will be the full and complete assessment. Only on the basis of singular component i.e. Q marks, final assessment

cannot be made because if V.I marks are omitted, then there will be no need for a SB at all since Q marks are available on records and

compiled in MDS (Member Data Sheet) as prepared by the office. Thus selection of respondent No. 4 excluding V.J marks cannot possibly

be done as in that case the spirit of the (a) 95 marks for quantified parameters to include confidential reports (CRs), Courses, Honours and

Awards and (b) five marks for value judgment by the selection board members for aspects that cannot be quantified. MoD's own poky

circular will be contravened. Such step as has been taken by the MoD will also give rise to serious doubts about the efficacy of the SB if

value judgment component to be awarded by the Members based on parameters as set out in the ibid circular, is not at all necessary and

only on the basis of records in the form of quantified marks, selection is made against very high positions of military administration of the

country. Value judgment of very senior Army Generals as board members if/ respect of a particular candidate cannot be ignored like this.

This would mean selecting a person whose assessment by the Board is incomplete vis-d-vis others, who have been validly selected in

accordance with policy.

6. Concluding his arguments, learned counsel for the applicant contended that the rejection of the statutory complaint filed by the applicant vide order

dated 27.12.2019 is without proper application of mind and hence the impugned order needs to be quashed.

7. Mr. Bhati, learned senior CGSC, justifying the action of the respondents in not empanelling the applicant for promotion to the rank of Major General

and rejecting his non-statutory and statutory complaints, contends that the assessment of the Selection Board is only recommendatory in nature and is

not binding until approved by the competent authority viz. the Central Government, in this case. To that extent, if the approving authority finds that the

V] marks have been assigned in a manner that results in changes in the pre-Board merit ranking based on Quantifiable Merit, without adequate

justification, it has the powers to set aside such changes in the merit ranking and resultant recommendations for promotion. He also contended that the

Courts should not substitute the findings of the Selection Boards by its own judgments and in this context, he placed reliance on the following decisions:

- (1) Union of India and others v. Lt Gen R.S. Kadyan (2000) 6 SCC 698;
- (ii) Ma] Gen IPS Dewan v. Union of India and others (1995) 3 SCC 383;
- (iii) S. L. Chabbra v. Union of India and others (1993) Supp (4) SCC 441;
- (iv) Lt Col Amrik Singh v. Union of India and others (2001) 10 SCC 424; and
- (v) Maj Surinder Shukla v. Union of India and others (2008) 2 SCC 649.

8. Learned counsel for the respondents further submitted that aggrieved by his non-empanelment to the rank of Major General by the No. 1 SB held in

October 2618, while being considered as a 'Final Review Case', the applicant had submitted a Non-Statutory Complaint on 25.03.2019, which was duly

examined by the competent authority. On examining the complaint along with his overall profile and other relevant documents and after consideration

of all aspects of the complaint, it had come out that all CRs in the reckonable profile were fair, objective, well corroborated, performance based and

technically valid. That apart, it was found that, there being no evidence of any bias or subjectivity, none of the CRs merited any interference. Further,

the applicant was not empanelled for promotion to the rank of Major General as assessed by the No. 1 SB. on account of his overall profile, relative

merit and comparative evaluation. It was on these grounds that the Non-Statutory Complaint of the applicant was rejected by the second respondent.

Furthermore, the first respondent, finding that all CRs of the applicant in the reckonable profile were fair, objective, well corroborated, performance

based and technically valid, rejected his Statutory Complaint. According to learned counsel for the respondents, the plea of the applicant to declare him

empanelled irrespective of availability of vacancies does not merit consideration as there is no such provision that

(a) A meeting of the No. 1 Selection Board was held on 14.10.2018 to assess suitability of EME Brigadiers of the 1986 Batch as well as review cases

of previous batches for promotion to the rank of Major General. The Selection Board was conducted in accordance with the new Promotion Policy

and Quantified System of Selection (QSS) issued by the third respondent (Military Secretary) on 23.12.2017. The COAS was the Chairman of the

Board while the Vice Chief and GOCin-Cs were the Members.

(b) A total of 24 Brigadiers of the EME were considered for selection against the 6 vacancies in the rank of Major General in the EME that were

available. The officers considered included 12 officers of the fresh batch (1986) and 12 review cases of the 1984 and 1985 batches, including the applicant. The pre-Board Quantified Merit out of 95 marks had been worked out prior to conduct of the Board, based on Confidential reports (CRs), Courses as well as Honours and Awards, while 05 marks for value judgment (VJ) were required to be assigned by the Board Members for aspects that cannot be quantified; the average of Vi out of 05 marks added to the Quantified Merit out of 95, to calculate the final marks out of 100 for each officer and arrive at the final merit.

(c) The Selection Board recommended 6 officers for empanelment for promotion to the rank of Major General, after assigning Board Marks as mentioned above, and forwarded the Selection Board proceedings to the first respondent for approval.

(d) On perusal of the Board proceedings by the first respondent, it was observed that the officer at Agenda No.17, who was 3rd in pre-Board

Quantified Merit, figured at 7th Merit position after adding the Vi marks and thus was not recommended for promotion, while the applicant, who was

at Agenda No. 23, who was 7th in the pre-Board Quantified Merit, had come up to position after adding of average of Vi marks assigned by the

Board Members and was accordingly recommended for promotion. This was because it was brought out by one Member during consideration by the

Board Members that there was an allegation of domestic violence and possible extra marital affairs made against the officer at Agenda No. 17 by his

wife, which allegation was under investigation.

(e) On a query made by the first respondent (GoI/ MoD) to the second respondent (COAS/ Army HQ) with regard to evidence or Court of Inquiry

proceedings to substantiate the contents of the complaint allegedly made by his wife against the officer at Agenda No. 17, it came out that the

complaint was a 'pseudonymous' complaint, the veracity of which was not backed by any evidence, and that no C of I was conducted as the officer's

wife had given a signed statement to the effect that she had not made any written complaint against the said officer. It was also noted by the first

respondent that it appeared from the contents and timing of the pseudonymous complaint that it was drafted with the aim of negatively influencing the

outcome of the said officer's Promotion Board result. Consequently, despite the

Selection Board not changing its earlier recommendations after reconsideration, the first respondent changed the recommendation in respect of the officer at Agenda No. 17 from 'Not Recommended' to 'Recommended', and the recommendation in respect of the applicant (Agenda No.23) from 'Recommended' to 'Not Recommended' and the competent authority approved the Board results accordingly. Thus, the applicant's name did not figure in the list of officers empanelled for promotion by the No. 1 Selection Board (EME) conducted on 14.10.2018.

11. Mr. Manglik, learned counsel for the applicant has argued that as per the policy, the Selection Board has the authority to assign Value Judgment (VJ) marks for important non-quantifiable qualities even to the extent of effecting changes in the pre-Board order of merit and the approving authority (Govt of India/ MoD in this case) does not have the authority to overturn such grant of marks and the consequent recommendations of the board in a whimsical and arbitrary manner. He has relied upon a number of judgments of the Armed Forces Tribunal and the Hon'ble Supreme Court which had upheld the authority of the Selection Board to assign VJ marks, which need not necessarily be in conformity with the Quantified Merit worked out on the quantified parameters like CRs and Courses.

12. On the other hand, Mr. Bhati, learned counsel for the respondents has contended that it is a settled law that the scope of judicial review in decisions of the approving authority by Courts/Tribunals is very limited and a Court cannot substitute its opinion or assessment for decisions of the Selection Board or the appointing authority. In this regard, the respondents have cited the decisions of the Honible Supreme Court in *Air Vice Alarsha/S.L. Chhabra (supra)*, *Aim& Singh (supra)*, *Lt Gen R.5 Kadyan (supra)*, *Maj Gen IPS Dewan (supra)* and *Maj. Surinder Shukla (supra)* to support the arguments made on their behalf. The decisions quoted above make it abundantly clear that judicial review is permissible, but only to the extent of finding whether the process in reaching decision has been observed correctly and not the decision as such.

13. In the light of the above, having carefully considered these rival contentions in the context of the facts of this particular case, we find that neither has the approving authority (Govt of India/ MoD) questioned the powers of the Selection Board to assign value judgment marks, even to the extent of

changing the pre-Board merit, nor has it overturned the recommendations of the Selection Board in an arbitrary manner. The approving authority had taken note of the suspicious timing of the 'pseudonymous complaint' purportedly sent by the wife of an officer, who was reasonably high (31u position) in the pre-Board Quantified Merit, to the extent that it had resulted in assigning of VJ marks by the Selection Board in a manner that it adversely affected the officer's promotion prospects. It also, after seeking clarifications from the second respondent, found that the officer's wife had given it in writing that she had not made any such complaint and further, there was no evidence available to substantiate the allegations made in the said 'pseudonymous' complaint. Therefore, we find that the approving authority did nothing wrong in making the required changes in the recommendations of the Selection Board while approving its recommendations, which, as an outcome, resulted in the applicant losing his place in the list of those recommended for promotions, which he had gained consequent to the aforesaid officer (Agenda No. 17) losing his place in the merit on account of unsubstantiated and pseudonymous allegations.

14. In the result, we do not find any merit in the O.A and dismiss the same. No order as to costs.

Pronounced in open Court on this the day of October 2020.